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PREDICTABILITY IN MERGER ENFORCEMENT AFTER *CALIFORNIA v. AMERICAN STORES*: CURRENT UNCERTAINTIES AND A PROPOSAL FOR CHANGE

INTRODUCTION

In the 1990 decision California v. American stores, the Supreme Court unanimously held that divestiture is a remedy available to states and private plaintiffs under section 16 of the Clayton Act. In this note, the author argues that by allowing the states to seek divestiture, the American Stores decision makes it more difficult for firms complying with the federal enforcement authorities to predict whether their mergers will subsequently be challenged by state authorities. To remedy this problem, the author proposes changes to section 7A(h) of the Clayton Act governing the distribution of Hart-Scott-Rodino filing information. The author argues that Congress should amend the Act to allow the distribution of the HSR information to the states for the limited purposes of conducting pre-merger negotiations or filing a section 7 suit for divestiture before a merger is consummated. This proposal will create a single federal/state enforcement process that will inform firms of problems in a manner that is timely, clear and final before they complete a merger.

Predictability and certainty in the law are necessary in an ordered society. They provide a coherent framework for behavior, enabling people to conclude whether or not specific actions and expectations are permissible and reasonable. Commentaries on the development of the common law assert that a legal system provid-

ing a high degree of predictability facilitates business and social transactions and ultimately promotes the administration of justice.¹ The creation and evolution of laws reflect this "undoubted public interest in 'stability and orderly development of the law . . .'"²

Lawmakers have attempted to provide predictability and certainty in many areas of the law. For example, uniform acts such as the Uniform Commercial Code³ and the Model Penal Code⁴ promote certainty in their respective fields of law by defining terms, adding finality to enforcement and establishing a framework for dispute resolution.⁵ These legal guides facilitate the functioning of a complex society by delineating the parameters of permissible activity and by clarifying the consequences for those who step beyond them.

Predictability and certainty, however, can be difficult to achieve. Existing laws may not always provide a definitive resolution for problems which arise. Furthermore, the law may not be as clear as it could be because no political consensus has developed favoring one approach over any other or because legislators consciously avoid an issue they view as a political quagmire. These factors strain the effectiveness of legal standards which can neither answer every unforeseen conflict nor account for changing political trends. As a result, a legal code is often not a sufficient articulation of the law.

An effective legal standard contemplates not only predictability and certainty, but also the standard's ability to produce correct results. Delivering justice on an individual basis requires a factual inquiry into each particular case. Effectiveness, therefore, depends on whether the standard can accommodate individual circumstances, novel legal issues or extraneous influences and still produce a just result. Tension exists between the general statement of a legal

1. FREDERIC R. COUDERT, *CERTAINTY AND JUSTICE* 1 (1914).

2. Charles J. Cooper, *Stare Decisis: Precedent and Principle In Constitutional Adjudication*, 73 CORNELL L. REV. 401, 405 (1988) (quoting *Johnson v. Transportation Agency*, 480 U.S. 616, 644 (1987) (Stevens, J., concurring)).

3. U.C.C. xv, 1 U.L.A. xv (1989) ("Uniformity throughout American jurisdictions is one of the main objectives of this Code . . .").

4. MODEL PENAL CODE (1985).

5. For example, the U.C.C. article governing sales transactions defines relevant terms, U.C.C. § 2-105, 1 U.L.A. 198-99, and specifies parties' remedies when disputes between them arise, § 2-711, 1B U.L.A. 321-22. Similarly, the Model Penal Code defines pertinent terms, such as the levels of culpability necessary to prove particular offenses, M.P.C. § 2.02(2).

standard and the ability of that standard to render workable or accurate results in a particular situation.

Antitrust law exemplifies this clash between predictability and correct results. Antitrust law reflects society's concern about unfair business practices that might threaten the availability of goods and services when too few entities control production. The monopolies controlled by industrial giants of the late nineteenth century prompted Congress to enact antitrust laws to provide "a competitive, free enterprise economy unencumbered by unreasonable or monopolistic restrictions on free market forces."⁶ The Sherman Antitrust Act,⁷ the Clayton Act,⁸ the Celler-Kefauver Act⁹ and the Hart-Scott-Rodino Antitrust Improvements Act of 1976¹⁰ reflect Congress' desire to prevent the anticompetitive effects of mergers.¹¹

The Clayton Act prohibits corporations from acquiring, either directly or indirectly, the assets of another corporation if the acquisition weakens competition substantially or creates a monopoly.¹² The Act also creates a comprehensive enforcement policy providing that "[a]ny person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws"¹³

Divestiture, one remedy for antitrust violations, has been the subject of recent debate within the Circuit Courts. The Ninth Circuit ruled that states and private parties could not seek a divestiture of those firms found guilty of Clayton Act violations,¹⁴ while the

6. 1 EARL W. KINTNER, *THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES* 7 (1978).

7. Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. § 1-7 (1988)).

8. Clayton Act, ch. 323, 38 Stat. 730 (1914) (current version in scattered sections of 15, 18 & 29 U.S.C. (1988)).

9. Act of Dec. 29, 1950, ch. 1184, 64 Stat. 1125 (current version at 15 U.S.C. §§ 18, 21 (1988)).

10. Hart-Scott-Rodino Antitrust Improvements Act of 1976, ch. 323, 90 Stat. 1383 (1976) (codified in scattered sections of 15, 18 & 28 U.S.C.) [hereinafter Hart-Scott-Rodino]. When referring to the procedures or information required by Hart-Scott-Rodino, this note uses the acronym HSR.

11. "The purpose of the antitrust laws is to promote competition and to inhibit monopoly and restraints upon freedom of trade in all sectors of the economy to which these laws apply." LAWRENCE A. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* § 3 (1977). See also *id.* § 204(a) (analyzing the consequences of mergers between direct competitors).

12. Clayton Act § 7, 15 U.S.C. § 18 (governing corporations' acquisitions of stock of other corporations).

13. Clayton Act § 16, 15 U.S.C. § 26.

14. *International Tel. & Tel. Corp. v. General Tel. & Elec. Corp.*, 518 F.2d 913, 920

First Circuit held that divestiture might be an appropriate remedy.¹⁵ In *California v. American Stores Co.*,¹⁶ the Supreme Court issued a unanimous decision resolving this split in the Circuits. The Court ruled that divestiture is available to state governments and private plaintiffs to remedy violations of the Clayton Act.¹⁷ The Court reasoned that private suits for divestiture support Congress' original intent of creating a vigorous antitrust enforcement structure by coupling government enforcement with private policing.¹⁸

Since *American Stores*, federal courts have the power to grant a state or private plaintiff's request for divestiture as an equitable remedy to prevent the anticompetitive effects of a merger. However, in the wake of *American Stores*, merging parties have no clear guidelines indicating when a divestiture will be granted to a state and, therefore, do not know how to structure their transactions to avoid divestiture. Prior to *American Stores*, merging firms could file under the HSR requirements,¹⁹ negotiate an agreement com-

(9th Cir. 1975).

15. See *CIA. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 429 (1st Cir. 1985) (rejecting a *per se* limitation on divestiture for private plaintiffs).

16. 110 S. Ct. 1853 (1990).

17. *Id.* at 1867 (holding that the plain meaning of § 16 allows private parties or state governments to seek divestiture as an equitable remedy).

18. *Id.* at 1860. To employ private actions as a complement to government efforts, Congress included straightforward language allowing a cause of action in equity under § 16 of the Clayton Act. Denying the divestiture remedy would unduly limit that cause of action in derogation of the policy goals underlying antitrust enforcement.

The Court qualified its decision by noting that "the power to order divestiture . . . does not, of course, mean that such power should be exercised in every situation" *Id.*

19. See Hart-Scott-Rodino § 7A, 15 U.S.C. § 18a. The Act prohibits acquisition of any voting securities or assets of another person (or corporation) unless both persons file notification with the Department of Justice ("DOJ") or the Federal Trade Commission ("FTC") under the following circumstances:

(1) the acquiring person, or the person whose voting securities or assets are being acquired, is engaged in commerce or in any activity affecting commerce;

(2) (A) any voting securities or assets of a person engaged in manufacturing which has annual net sales or total assets of \$10,000,000 or more are being acquired by any person which has total assets or annual net sales of \$100,000,000 or more;

(B) any voting securities or assets of a person not engaged in manufacturing which has total assets of \$10,000,000 or more are being acquired by any person which has total assets or annual net sales of \$100,000,000 or more; or

(C) any voting securities or assets of a person with annual net sales or total assets of \$100,000,000 or more are being acquired by any person with total assets or annual net sales of \$10,000,000 or more; and

plying with the federal government's standards and proceed with the merger without fear that another party could initiate subsequent proceedings that might lead to a finding of non-compliance and thwart the transaction. After *American Stores*, satisfying federal authorities does not guarantee that merging firms will not subsequently be sued by either a state or private plaintiff seeking divestiture.

American Stores creates predictability problems of two varieties for merging firms: predictability of the outcome and predictability of the process. Outcome refers to the results of merger analyses conducted by enforcement authorities and reviewed by the courts. Predictability of outcome depends on 1) whether enforcement authorities and the courts consistently apply an explicit and specific analytical standard when evaluating mergers and 2) whether enforcement authorities will exercise their discretion to challenge a merger even when the transaction satisfies the standard.²⁰ If the enforcement authorities and the courts consistently apply a specific standard, a firm desiring to merge will be able to predict whether the merger will be challenged and adjust its behavior accordingly.

Predictability of the process refers to the regulatory procedures firms must follow to complete a merger. An enforcement process is predictable if it is timely, clear and final. Timeliness requires that enforcement officials evaluate a proposed merger within a reasonable period of time. In order to be clear, the enforcement process must specify the necessary participants, the procedures and the

(3) as a result of such acquisition, the acquiring person would hold—

(A) 15 per centum or more of the voting securities or assets of the acquired person, or

(B) an aggregate total amount of the voting securities and assets of the acquired person in excess of \$15,000,000.

Id.

20. Firms may attempt to test the limits of enforcement standards by submitting merger proposals in potentially questionable cases to the FTC or DOJ, depending on which agency is assigned to evaluate mergers in the area of commerce affected by the merger. The designated agency may then decide to approve the merger or to challenge the merger. Negotiation between the federal agency (DOJ or FTC) and the merging firms might take place when the merger presents problems the firms can remedy through partial divestitures. See *California v. American Stores*, 110 S. Ct. at 1856 (finding that the FTC approved the merger after American Stores complied with the FTC's condition that it divest itself of several Lucky Stores that it would obtain through the merger).

The negotiation process is one mechanism which can relieve the tension between legal standards and correct results. Through negotiation, the parties can reach a compromise in which impermissible aspects of a specific merger are deleted so that the transaction satisfies applicable legal standards without sacrificing the entire deal.

rights and obligations each party possesses at each stage. Finality demands that merging firms be able to rely upon an authoritative decision like those of the FTC or DOJ to determine whether proposed transactions will be challenged.

Outcome and process are related. The desired outcome will necessarily affect the structure of the process. If standards are applied uniformly, it is possible to achieve the goals of timeliness, clarity and finality in the process as well as predictability of outcome.

This note explores predictability of outcome and process in the context of current federal and state enforcement of the federal anti-merger statutes. Specifically, it explores the problem the *American Stores* decision creates with respect to outcome and process. The issues presented by *American Stores* highlight many of the problems related to outcome and process in merger enforcement; the Court's holding exacerbates them.

This note proposes modifications to improve the predictability of merger proposal evaluations with respect to the antitrust laws. Specifically, the note explores mechanisms for maintaining an effective federal antitrust policy that contemplates the availability of the divestiture remedy to states. Ultimately, enforcement of the anti-merger laws would be best served by supplanting the present system with a consistent analytical standard and process to guide the efforts of both federal and state authorities. This proposal rests on a variety of assumptions and value-judgments regarding the desirability and effectiveness of a federal merger policy.²¹

Part I of this note examines the state of antitrust law prior to *American Stores* and analyzes the decision itself.²² This review illustrates that a greater degree of predictability in both outcome and process existed at that time. The discussion of the *American Stores* decision highlights the changes it made in the law that diminish the predictability of outcome and process in mergers.

Any modifications to antitrust law made to recapture predictability of both outcome and process will necessarily reflect a particular antitrust policy. Part II of this note explores federal and state antitrust policies, highlighting the major goals and concerns of each and stressing the differences between the perspectives and

21. See *infra* text accompanying notes 72-90, 129-36.

22. See *infra* text accompanying notes 26-71.

agendas which guide their enforcement policies.²³ Comparing the federal and state approaches reveals that a uniform policy must be the basis for modifying existing federal antitrust laws. Nonetheless, to be effective, the modifications must acknowledge the significant role of the states in enforcing the federal antitrust laws and provide a venue for states to safeguard their positions throughout the enforcement process.

Part III proposes modifications to the antitrust laws that will accommodate the availability of a divestiture remedy for states and private plaintiffs, strengthen federal antitrust enforcement and increase the predictability in both the outcome and process of merger enforcement.²⁴ These modifications address the relationship between the federal and state authorities participating in the enforcement process and do not extend to private plaintiffs. Specifically, this note proposes (1) distributing the HSR filing information to state attorneys general and (2) allowing states to use that information only in the pre-merger negotiation stages or to file a challenge to the merger under section 7 of the Clayton Act in federal court.²⁵

PART I

A. Mergers And Acquisitions Prior To *California v. American Stores*: Predictability In Outcome And Process

The merger enforcement process offered a greater degree of predictability before *American Stores* than it has offered since that decision. In a typical merger prior to *American Stores*, firms filed statutorily required information describing proposed mergers with either the FTC or the DOJ under the Hart-Scott-Rodino Act.²⁶ Federal authorities then reviewed the filings for indications of potential anti-competitive effects caused by the merger.²⁷ Negotia-

23. See *supra* text accompanying notes 72-107.

24. See *infra* text accompanying notes 108-47.

25. Federal courts have exclusive jurisdiction over cases arising under the federal antitrust laws. 28 U.S.C. § 1337(a).

26. Hart-Scott-Rodino § 7A, 15 U.S.C. § 18a.

27. The FTC and DOJ use the required information primarily to discern the market impact of a given merger. For example, the DOJ conducts an economic analysis to determine whether the merger will "create or enhance 'market power' or . . . facilitate its exercise." U.S. Department of Justice Merger Guidelines, 49 Fed. Reg. 26,823, 26,827 (1984) [hereinafter Merger Guidelines].

tions might follow during which federal authorities would express their misgivings about the expected impact on market share and the merging firms would agree to resolve anticipated problems.²⁸

Under the old regime, adherence to the negotiated settlement usually protected firms from post-merger divestiture suits brought by the federal government, absent any significant unforeseen changes in the merged firms' projected market share.²⁹ A divestiture suit can follow a negotiated settlement and a completed merger. As a result, merging firms cannot rely absolutely on the federal government's pre-merger decisions. However, government decisions to forgo lawsuits made sense because challenging mergers after good-faith negotiations would discourage firms from engaging in future negotiations with the government. Furthermore, because firms were dealing with only one enforcement agency, they could reasonably conclude that the agency's view would be final. Therefore, the merging firms could expect that a pre-merger settlement would most likely prevent a post-merger lawsuit even though no legal mechanism existed then or now to bar future government action.

Two scenarios illustrate when post-settlement government challenges to a completed merger are justified: (1) where the merging firms have supplied the FTC or DOJ with incomplete or inaccurate HSR information; and (2) where the government must interpret conflicting facts about the impact of a merger and choose

28. Government action with respect to mergers varies with changes in the prevailing political and economic ideologies. An historical overview of antitrust disputes reveals different degrees of enforcement among different administrations. See generally Arthur Austin, *Antitrust Reaction to the Merger Wave: The Revolution vs. the Counter Revolution*, 66 N.C. L. REV. 931 (1988) (tracing the history of antitrust enforcement including emergence of the Chicago School of economic analysis as the theoretical basis for analyzing market impact of mergers). For example, contrary to the conservative tendency toward deregulation, the Nixon administration pursued a policy of strict antitrust enforcement, challenging most mergers as anticompetitive. *Id.* at 940. The Warren Court also tended to be anti-merger. During the Warren era, the Court developed a variety of quantitative rules which it then used as the basis for prohibiting most mergers that came before it. *Id.* at 936. In contrast, President Reagan's antitrust policies were described as "Reagan Nonantitrust." *Id.* at 943. Critic's of the Reagan approach to antitrust enforcement implicate it as the cause of a wasteful merger wave and a "source of moral corruption and the subversion of business ethics." *Id.* at 944.

The effects of various political and economic philosophies on outcome and process are relatively predictable because the policy goals of a particular administration are usually readily apparent. Difficulties in predicting the success of a proposed merger are more likely to stem from ambiguous, malleable analytical standards and processes governing merger enforcement.

29. For a discussion of market power, see *infra* text accompanying notes 78-87.

between them as a basis for its decision. The first scenario is perhaps the clearest situation in which the government should not be estopped from bringing a post-merger divestiture suit. If merging firms are not entirely candid with the enforcement authorities, a subsequent post-merger divestiture suit is reasonable and just.³⁰ A lack of candor suggests that certain damaging information pertaining to potential anticompetitive effects was withheld. The policy of vigorous enforcement should encourage suits in these situations.

The second scenario, positing a government's choice between conflicting data about the impact of a merger, illustrates a problem inherent in analyzing mergers — economic analysis often produces conflicting indications about the effects of a merger. The economic theories and methods of analysis chosen may focus on different facts in reaching a conclusion. This problem gives rise to two questions. First, upon which set of facts should the government rely to determine whether the merger is permissible? Second, after selecting particular facts as the relevant criteria for its decision, should the government be estopped from bringing a divestiture suit if its choice proves incorrect?

The Supreme Court answered these questions when it held in *United States v. General Dynamics Corp.*³¹ that despite the apparent nonoccurrence of anticompetitive effects, a divestiture claim is available long after completion of a merger.³² The Court indicated that the facts relied upon by the FTC or DOJ to determine whether or not a merger is anticompetitive are not dispositive of the estoppel issue because the relevant time period extends to the moment a

30. See, e.g., *Nolan v. Lee Hoo*, 577 A.2d 143, 146 (N.J. 1990) (stating that a settlement agreement is a contract which will be honored by the court unless fraud or other compelling circumstances are shown).

31. 415 U.S. 486 (1974).

32. See *id.* at 506 (holding that the district court justifiably focused on considerations other than undue concentration in the coal industry in deciding that no substantial lessening of competition occurred or was threatened by the defendant's acquisition of a strip mining company). In a footnote, the Court stated:

The mere nonoccurrence of anticompetitive effects from a merger would, of course, merely postpone rather than preclude a divestiture suit. This Court indicated in *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 597, that a merger may be attacked *ab initio* long after its culmination if effect on competition not apparent immediately after the merger subsequently appears, since § 7 was designed to arrest the creation of monopolies "in their incipency" and "incipency" . . . denotes not the time the stock was acquired, but any time when the acquisition threatens to ripen into a prohibited effect"

Id. at 505 n.13.

merger threatens competition.³³ Therefore, if the facts relied upon at the time of a merger change substantially, a divestiture suit may become warranted.

With respect to the second question, whether the government should be estopped when it incorrectly predicts the effects of a merger, the Court answered by focusing on the goal of a section 7 suit, "to arrest the creation of monopolies 'in their incipency'"³⁴ The Court construed this provision as a tool to correct the inaccuracies of economic analysis by allowing a divestiture suit in the event market conditions change significantly.³⁵ If the government were estopped from bringing a divestiture suit under these circumstances, corporations would be allowed to continue potentially anticompetitive practices, thereby frustrating the purposes of the antitrust laws. Predictions about the market impact of proposed mergers are only educated guesses, not concrete conclusions that a merger will affect the market in a particular way. For this reason, the second scenario offers an equally strong justification for allowing post-merger suits. The government could not uphold antitrust policies if merging firms were absolutely insulated from a post-merger suit.

The preceding discussion illustrates the tension inherent in antitrust law. Predetermined standards set out in statutes do not provide an entirely accurate means of predicting the impact of a merger. Yet, despite the potential for post-merger challenges, the merger process before *American Stores* offered enough certainty that the business world was willing to engage heavily in merger activity during the 1980's. In 1980, the reported value of completed mergers was \$33 billion.³⁶ By 1989, this figure had reached \$230 billion, an increase of more than 600 percent.³⁷ In 1988, the DOJ received approximately 2300 HSR filings.³⁸ Of that number, the DOJ investigated approximately sixty mergers and ultimately challenged twelve as violating section 7 of the Clayton Act.³⁹ As these statistics illustrate, the majority of mergers subject to the

33. *Id.* at 505.

34. *Id.*

35. *Id.* at 505 n.13.

36. Seymour D. Lewis, *Why States Are Stepping Up Attacks on Large Mergers*, *MERGERS AND ACQUISITIONS*, July-Aug. 1990, at 1, 35.

37. *Id.*

38. Panel Discussion, *Merger Enforcement at the Antitrust Division*, 58 *ANTITRUST L.J.* 329, 330 (1989).

39. *Id.*

Hart-Scott-Rodino filing requirements proceed without a challenge from the federal enforcement authorities.

The federal government's enforcement policy also supports the conclusion that the pre-*American Stores* merger process offered firms a reasonably certain means of successfully completing a merger. Even though the DOJ or FTC may file a post-merger divestiture suit, policy statements reflect a preference to do otherwise. According to John W. Clark, Deputy Director of Operations at the DOJ's Antitrust Division, "[DOJ] always make every effort, if [it] decide[s] that [it] must sue, to bring that case before the transaction is consummated. That is what is behind Hart-Scott-Rodino."⁴⁰ The statute's pre-merger notification requirements facilitate efforts by the government and merging firms to resolve problems prior to completion of the merger. The government's policy to challenge mergers before their completion, if at all, strengthens goodwill during settlement negotiations and offers firms incentives to comply with the filing requirements at the outset. As a result, the DOJ and FTC ultimately improve merger enforcement by not seeking post-merger divestitures on a regular basis.

Prior to *American Stores*, suits by states and private plaintiffs seeking divestiture were not a significant concern for merging firms. In some cases, those claims were not permitted by federal courts.⁴¹ States and private plaintiffs could seek other remedies including hold separate orders and preliminary injunctions which would effectively prevent the consummation of a merger,⁴² but the divestiture suit, with its drastic consequences, was essentially re-

⁴⁰ *Id.* at 333.

⁴¹ *See, e.g.,* CIA. *Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 414 (1st Cir. 1985) (divestiture not available to states).

⁴² Generally, if a court grants a hold separate order or a preliminary injunction, the order will effectively stop the merger. *FTC v. PPG Industries, Inc.*, 798 F.2d 1500, 1506 (D.C. Cir. 1986) (characterizing preliminary injunctions as "merger-blocking"); *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1075 n.7 (D.C. Cir. 1981) (explaining that hold separate orders "require[] the acquiring company to preserve the acquired company . . . as a separate and independent entity during the course of antitrust proceedings"). Few firms are likely to find the anticipated benefits of merger worth the costs of pursuing the uphill battle of completing a merger that a court deems potentially anticompetitive at the outset.

A court will grant a hold separate order or preliminary injunction when it appears that a merger could have potentially anticompetitive effects and threatens to harm the plaintiff. *Weyerhaeuser*, 665 F.2d at 1085. Furthermore, there is a "presumption in favor of a preliminary injunction when the [government] establishes a strong likelihood of success on the merits." *PPG Industries*, 798 F.2d at 1507. Preventing an eventual determination that a merger is unlawful may require such substantial modifications to the merger agreement that the transaction will not be profitable.

served to the federal authorities. Therefore, pre-merger settlement with the federal government usually meant that firms could expect that a post-merger challenge as devastating as a divestiture suit would not occur.

B. *California v. American Stores* — Predictability Unraveled

1. The Case and its Holding

American Stores, a supermarket chain operating more than 1500 stores in forty states, was the fourth largest grocery store chain in California.⁴³ Lucky Stores, operating in seven western and midwestern states, was the largest chain in California.⁴⁴ Pursuant to the HSR filing requirements,⁴⁵ American Stores notified the FTC on March 21, 1988, that it intended to acquire all of Lucky's outstanding stock, worth \$2.5 billion.⁴⁶

Following its investigation, the FTC negotiated a settlement with American Stores. In conjunction with the negotiations, the FTC filed a suit alleging that the merger violated section 7 of the Clayton Act. The FTC agreed to settle the suit if American Stores would agree to comply with a consent order imposing certain conditions upon the merger.⁴⁷ As one condition, the court imposed a hold separate order⁴⁸ until American Stores divested itself of certain supermarkets.⁴⁹ American Stores agreed to comply with the FTC requirements, took steps to divest as directed and, thereafter, completed the merger on August 30, 1988.

The day after the FTC gave its final approval to the merger,

43. *California v. American Stores Co.*, 110 S. Ct. 1853, 1856 (1990).

44. *Id.*

45. *See supra* note 19.

46. *American Stores*, 110 S. Ct. at 1856.

47. *Id.* at 1856.

48. *Id.* Hold separate orders are used to maintain the individual identity of merging firms pending the completion of investigations or, as here, pending compliance with various conditions imposed by federal authorities. By maintaining the firms as separate entities, courts avoid the difficult task of splitting apart firms unable to comply with conditions for approval or whose merger is found to violate the antitrust laws. *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1075 n.7 (D.C. Cir. 1981).

49. *American Stores*, 110 S. Ct. at 1856 & n.2. The Court required American Stores to maintain separate books for the acquisitions, prevent waste of Lucky's California operations, retain Lucky's executives, maintain Lucky as viable competitor, refrain from selling Lucky's warehouse, distribution or manufacturing facilities, and preserve separate purchasing practices. *Id.* at 1856 n.2.

California filed a complaint in federal district court⁵⁰ alleging, inter alia, that the merger violated section 7 of the Clayton Act.⁵¹ Specifically, California complained that the merger would effectively eliminate competition in many areas of the state. Among the remedies sought by California was "an injunction requiring American Stores to divest itself of all of Lucky's assets and businesses in the state of California."⁵²

Finding that California's statistical evidence "proved a prima facie violation of [section] 7 of the Clayton Act," the district court issued a preliminary injunction blocking the merger.⁵³ Because the merger was complete "as a matter of legal form,"⁵⁴ American Stores argued that the preliminary "injunction was 'tantamount to divestiture.'"⁵⁵ The lower court concluded, however, that because the hold separate order was in effect, the merger was not yet complete.⁵⁶

On appeal, the Ninth Circuit held that California had proven a likelihood of success on its section 7 challenge, but that issuance of the preliminary injunction was impermissible.⁵⁷ The circuit court based its decision on *International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp.*,⁵⁸ which held that divestiture, either direct or indirect, was not an available remedy in private actions.⁵⁹

The Supreme Court granted certiorari⁶⁰ to resolve a conflict between the Ninth Circuit's holding in *American Stores* and the First Circuit's decision allowing divestiture in *CIA. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*⁶¹ Holding in favor of California, the Court "agree[d] that the plain text of § 16 [of the Clayton Act] authorizes divestiture decrees to remedy § 7 viola-

50. *Id.* at 1856.

51. The complaint also alleged a violation of the Sherman Act, 15 U.S.C. § 1. *Id.*

52. *Id.* (citing California's prayer for relief).

53. *Id.* at 1857.

54. *Id.* at 1856.

55. *Id.* at 1857.

56. *Id.*

57. *Id.*

58. 518 F.2d 913 (9th Cir. 1975).

59. *Id.* at 924. For an explanation of how hold separate orders can constitute an indirect order for divestiture, see *supra* note 42 and accompanying text. The *ITT* court warned that it is not permissible for courts to "accomplish through verbal calisthenics that which . . . [can] not [be] accomplish[ed] directly." *Id.*

60. See *American Stores*, 110 S. Ct. at 1856.

61. 754 F.2d 404 (1st Cir. 1985). The *Petrolera* court's opinion summarizes the split of authority regarding the availability of divestiture to private litigants. *Id.* at 414.

tions."⁶²

The Supreme Court based its decision on the broad remedial language of the Clayton Act.⁶³ Furthermore, the Court examined the sparse legislative history and found no clear Congressional intent to limit the divestiture remedy to actions prosecuted by the federal government.⁶⁴ In fact, the Court held that Congress did not intend "to constrict the availability of injunctive remedies against violations that have already begun or occurred, but rather to expand their availability against harms that are as yet unrealized."⁶⁵ The Court noted that this expansive construction of the remedies available to redress section 7 violations coincides with the general purpose of the remedies provision to facilitate broad and vigorous enforcement of the antitrust laws.⁶⁶

In *American Stores*, the Supreme Court interpreted section 16 of the Clayton Act as arming the states with the power to seek divestiture.⁶⁷ This interpretation gave the states an additional mechanism to challenge questionable mergers. Although the Court's decision was consistent with the terms of the statute, the *American Stores* opinion has left many problematic issues for Congress to resolve.

2. Problems and Uncertainties

Since the *American Stores* decision allowing the states to seek divestiture, states have a more significant role in enforcing the federal merger laws. A state's ability to exercise this power raises serious considerations that merging firms cannot ignore. These concerns go beyond the mere possibility that a suit challenging a merger will be brought by state enforcement authorities as well as

62. *American Stores*, 110 S. Ct. at 1859.

63. Clayton Act § 16, 15 U.S.C. § 26. See *supra* text accompanying note 13.

64. *American Stores*, 110 S. Ct. at 1866.

65. *Id.* at 1859 n.8.

66. *Id.* at 1860. The Court stated, "by construing § 16 to encompass divestiture decrees we are better able to harmonize the section with its statutory context. The Act's other provisions manifest a clear intent to encourage vigorous private litigation against anticompetitive mergers." *Id.*

67. See generally Paul V. Timmins, Note, *Divestiture as a Remedy Brought in Private Actions Under Section 16 of the Clayton Act*, 84 MICH. L. REV. 1579 (1986) (arguing that a court should be free to exercise its remedial powers to the full extent since Congress did not expressly limit courts' equity jurisdiction in § 16 of the Clayton Act). Timmins concluded that divestiture could be an appropriate remedy after he analyzed the language of § 16, the relevant legislative history of the Clayton Act, courts' right to exercise their equitable powers and policy considerations favoring the divestiture remedy.

by federal agencies. State antitrust concerns differ from federal concerns because states focus on the local impact of a merger such as loss of jobs and other effects on particular communities. Because state concerns diverge from the concerns of the federal government, states have created different standards to evaluate mergers.⁶⁸

American Stores, therefore, interferes with firms' ability to predict the outcome of proposed mergers by facilitating state assessments under different analytical standards than those applied by the FTC or DOJ. Firms may even find themselves in a catch-22 where satisfying a federal condition for merger approval conflicts with a state objective. In addition, if a claim seeking divestiture advanced an erroneous standard for decision, a court might incorrectly adopt it, creating an open door for potentially dangerous precedent. Subjecting proposed mergers to reviews under different analytical standards creates the potential for inconsistent enforcement decisions by federal and state authorities which are, ironically, executing enforcement powers conferred by the same federal statutes.

American Stores also disrupts the predictability of the process in several ways. First, the holding adversely affects the timeliness of the merger enforcement process. The decision to merge reflects a business judgment that the merger will increase productivity, efficiency and earnings. Firms expect that the proposed transaction will not be the subject of a prolonged investigation by authorities incapable of rendering a fairly certain decision in a reasonable amount of time. The FTC and DOJ have generally satisfied this expectation by providing merging firms with prompt indications about whether or not they intend to challenge a particular merger. Following *American Stores*, however, firms must also assess the potential for a state challenge, thus diverting their attention to the states' enforcement activities and slowing the merger process overall. In the case of mergers on a national scale, the need of firms to contend with several states' attorneys general, each concerned with his or her state's own agenda, would undoubtedly delay the process.

Second, the merger process is less predictable after *American Stores* because the enforcement process will be generally more confusing for firms contemplating merger than when firms had to

68. See *infra* text accompanying notes 91-107.

contend only with federal authorities. When should firms include the states in their merger planning? What procedures should the firms follow if they decide to consult with the states? What rights do the parties possess throughout the process? One commentator has suggested that after *American Stores*, "several states or private plaintiffs might bring suits challenging a merger in different federal courts, each [asserting their own] divestiture demands."⁶⁹ Firms will have no indication through the antitrust enforcement process whether their merger will become the subject of multiple federal suits.

Third, *American Stores* disrupts the predictability of the enforcement process by weakening the federal government's ability to negotiate settlements with the merging firms. Firms have little incentive to settle with federal authorities absent some assurance of finality.⁷⁰ In fact, *American Stores* made a similar argument in its brief to the Supreme Court.⁷¹ The government's settlement power is diminished because firms do not necessarily benefit by conceding to particular federal requests regarding the merger if they cannot be assured in return that states will not initiate post-merger suits. Separate state enforcement of federal merger laws renders FTC and DOJ approval merely tentative. Firms cannot follow the federal review process exclusively if they wish to obtain finality, at least to the extent finality from negotiated settlements has ever been possible. To obtain relatively final approval, firms must now subject proposed mergers to at least two processes (and maybe more where several states become involved) that may assess the merger under potentially conflicting analytical standards. Thus, after *American Stores*, merging firms are left without clear enforcement standards or procedures that address the divestiture issue *vis a vis* the states.

69. Kenneth E. Newman, *High Court Upholds Challenges to Mergers*, N.Y. L.J., June 4, 1990, at 5, 8.

70. See *supra* text accompanying notes 37-43.

71. See Respondent's Brief at 43, *California v. American Stores Co.*, 110 S. Ct. 1853 (1990) (No. 89-258) *American Stores* suggested that Congress acted wisely in limiting the remedies available to "non-federal plaintiffs" because of the "potential for abuse" from empowering these parties with the full range of remedies. Respondent argued that if given the opportunity, such plaintiffs would be able to seek *post hoc* structural remedies that would have a negative impact on merger enforcement. *Id.*

PART II

In this Part, the note examines federal and state antitrust policies and evaluates the roles of federal and state authorities in enforcing antitrust laws. This analysis provides background useful for developing modifications to the antitrust enforcement scheme which will improve the predictability of the outcome and process for merging firms.

A. Federal Antitrust Policy: An Overview

Federal antitrust policy is best understood through an examination of the Department of Justice Merger Guidelines.⁷² The Merger Guidelines are designed to indicate when the DOJ is likely to challenge a merger.⁷³ It is also important to recognize that the theoretical foundation for the policies and procedures outlined in the Merger Guidelines reflect the economic philosophy of the Chicago School.⁷⁴ The fact that mergers may prove to be procompetitive in some markets while anticompetitive in others complicates antitrust enforcement. The Merger Guidelines represent the federal government's effort to design an enforcement scheme which renders appropriate results in light of this inherent conflict.

Antitrust law developed in response to the general objection to undue market power. The Sherman Act,⁷⁵ the Clayton Act⁷⁶ and subsequent legislation⁷⁷ were intended to prevent the concentration of industry in the hands of a few. The language of the Merger Guidelines remains consistent with this policy, noting that the "unifying theme of the Merger Guidelines is that mergers should

72. Merger Guidelines, *supra* note 27. The Merger Guidelines "state . . . the present enforcement policy of the U.S. Department of Justice . . . concerning acquisition and mergers . . . subject to section 7 of the Clayton Act . . . [and] describe the general principles and specific standards normally used by the Department in analyzing mergers." *Id.* at 26,827.

73. *Id.* ("[T]he Department [of Justice] hopes to reduce the uncertainty associated with enforcement of the antitrust laws . . .").

74. For a complete discussion of the emergence of the Chicago School in antitrust law enforcement, see Austin, *supra* note 28, at 945-49. Austin traces the case history through which the Chicago School theories prevailed as the dominant analytical standard. *Id.* at 950-54. Austin also noted that personnel changes in key judicial and executive positions have helped to expedite the prevalence of Chicago theories in merger analysis. *Id.* at 948.

75. 15 U.S.C. §§ 1-7.

76. Clayton Act § 7, 15 U.S.C. § 18.

77. Celler-Kefauver Amendment, 15 U.S.C. § 18; Hart-Scott-Rodino § 7A, 15 U.S.C. § 18a.

not be permitted to create or enhance 'market power'"⁷⁸

The Merger Guidelines define market power as the "ability of one or more firms [sellers] profitably to maintain prices above competitive levels for a significant period of time"⁷⁹ Likewise, buyers exercise market power when they depress the price of a product below the competitive level.⁸⁰ In either instance, the result is a misallocation of resources between buyers and sellers.⁸¹ Cartel formation and other forms of collusion can signal an ability to exercise market power.⁸²

The Merger Guidelines incorporate a number of methods for analyzing market power⁸³ which focus on the relationship between a merger and the participating firms' market⁸⁴ to determine whether unacceptable levels of market power will result.⁸⁵ The analytical method incorporated in federal policy draws heavily from Chicago School teachings that advocate a comprehensive factual economic analysis of each merger to determine whether it will have anticompetitive effects instead of bright-line tests.⁸⁶ According to the Merger Guidelines,

it is not possible to remove the exercise of judgment from the evaluation of mergers under the antitrust laws. Because the specific standards set forth in the Merger Guidelines

78. Merger Guidelines, *supra* note 27, at 27,827.

79. *Id.*

80. *Id.*

81. *Id.*

82. *See id.* at 26,833 (indicating that the DOJ is more likely to challenge a merger in which the firms have been found to have colluded in setting prices).

83. For a critique of the analytical methods used in the Merger Guidelines, see R. Preston McAfee & Michael A. Williams, *The Department of Justice Merger Guidelines: A Critique and a Proposed Improvement*, 16 PEPP. L. REV. 1069, 1070 (1989) (concluding that both the rationale and the standard used in the Merger Guidelines are flawed and proposing an alternative).

84. The Merger Guidelines define a market as:

a product or group of products and a geographical area in which it is sold such that a hypothetical, profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products in that area would impose a "small but significant and non-transitory" increase in price above prevailing or likely future levels.

Merger Guidelines, *supra* note 27, at 26,827.

85. *See id.* at 26,830-37 (discussing the methods of determining market power and the levels of market power DOJ finds acceptable).

86. *See Austin, supra* note 28, at 948-49 (noting the contrast between the Chicago School's emphasis on economic analysis to determine whether a merger is permissible and older Warren Court decisions which used bright-line tests based on more subjective criteria).

must be applied to a broad range of possible factual circumstances, strict application of those standards may provide misleading answers to the economic questions raised under the antitrust laws Therefore, the Department will apply the standards of the Merger Guidelines reasonably and flexibly to the particular facts and circumstances of each proposed merger.⁸⁷

Federal antitrust policy is also consistent with Chicago School teachings which recognize that efficiency is a desirable benefit to be derived from mergers.⁸⁸ Former Attorney General William French Smith stated that "[i]mplicit throughout the Merger Guidelines is the recognition that the efficiency-enhancing potential of mergers can increase the competitiveness of firms and result in lower prices to consumers."⁸⁹ By recognizing the benefits derived from efficiencies, the DOJ's antitrust policy encourages the healthy development of the economy.

[M]ergers generally play an important role in a free enterprise economy. They can penalize ineffective management and facilitate the efficient flow of investment capital and the redeployment of existing productive assets. While challenging competitively harmful mergers, the Department seeks to avoid unnecessary interference with that larger universe of mergers that are either competitively beneficial or neutral.⁹⁰

The Merger Guidelines are by no means a wholly accurate measure of whether a merger will result in undue market power. But the federal policy embodied in them appropriately acknowledges the necessity of maintaining some flexibility in applying the specific analytical standards promulgated to effectuate the antitrust laws. Flexible application of the standards relieves some of the tension between the broad language of section 7 of the Clayton

87. Merger Guidelines, *supra* note 27, at 26,827.

88. One Chicago School advocate, Judge Easterbrook, believes that efficiency should be the first priority in enforcing the antitrust laws. See Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1703-04 (1986) (explaining how goals other than efficiency require judges to redistribute income).

89. William French Smith, Att'y Gen., Statement Accompanying Release of Revised Merger Guidelines, 49 Fed. Reg. 26,824, 26,826 (1984). Smith also noted that "the Department considers and gives appropriate weight to efficiency claims in all cases in which they are established by clear and convincing evidence." *Id.*

90. Merger Guidelines, *supra* note 27, at 26,827.

Act and the difficulty of articulating a consistent, workable and accurate method for evaluating mergers.

B. State Antitrust Policy: An Overview

During the past several years, state antitrust enforcement has increased. Viewing federal enforcement as inadequate, and active antitrust enforcement as necessary to maintaining or improving their local economies, state attorneys general have pursued efforts to strengthen and coordinate their antitrust enforcement laws and procedures.⁹¹ Most notably, the National Association of Attorneys General (NAAG) has attempted to enhance and coordinate a state antitrust enforcement program to protect local markets and consumers.⁹²

The emergence of the NAAG as the catalyst for active, coordinated enforcement efforts has provided the states with power to control the outcome of a merger. Like the DOJ, the NAAG has published both vertical⁹³ and horizontal⁹⁴ restraint guidelines to

91. See *NAAG Adopts Resolution Endorsing Model Antitrust Reform Legislation*, 51 Antitrust & Trade Reg. Rep. (BNA) No. 1294, at 891 (Dec. 11, 1986) [hereinafter *NAAG Adopts Resolution*].

92. State efforts to develop a cooperative antitrust enforcement program reflect the concern that individual states lack the information necessary to evaluate a prospective merger's impact on its local economies. For the states, costly court orders are required to obtain what amounts to HSR filing information. Efforts by states to obtain this information have met with opposition from both courts and federal legislators. See *Mattox v. FTC*, 752 F.2d 116, 124 (5th Cir. 1985) (holding that § 7A(h) of the Clayton Act precludes distribution of HSR information to the states); *Lieberman v. FTC*, 771 F.2d 32, 38 (2d Cir. 1985) (reasoning that because Congress designated the two agencies entitled to the information (the FTC and DOJ), courts should not imply that other parties, including the states, are entitled to the information).

Other efforts by the NAAG include the creation of the National Association of Attorneys General Voluntary Pre-Merger Disclosure Compact (Dec. 13, 1987), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,410, at 21,201 (Aug. 16, 1988) [hereinafter *Compact*]. Under the Compact, states agree not to serve pre-complaint discovery motions on the merging parties if the merging firms agree to provide the designated state with a copy of the HSR filing. *Id.* ¶ 13,410, at 21,202; see also Newman, *supra* note 69, at 8 (summarizing the Compact's procedures).

The NAAG has also created horizontal and vertical merger guidelines. See *infra* notes 93-94. The cooperative efforts of states combined with individual states' antitrust laws signal states' intent to take an active role in the enforcement process to protect local markets from the potentially adverse effects of large-scale merger activity.

93. National Association of Attorneys General Vertical Restraints Guidelines (Dec. 4, 1985), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,400, at 21,155 (Jan. 31, 1989) [hereinafter *Vertical Restraints Guidelines*].

94. National Association of Attorneys General Horizontal Merger Guidelines (Mar. 10, 1987), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,405, at 21,181 (Jan. 31, 1989) [here-

set the standards for their merger analyses.⁹⁵

The NAAG Guidelines share the federal Merger Guidelines' objections to undue market power.⁹⁶ However, the NAAG expressed dissatisfaction with the laxity of federal standards when it unanimously approved a more restrictive set of guidelines in March 1987.⁹⁷ State antitrust policy diverges concerning enforcement of federal antitrust law from the theoretical underpinnings of the federal rules by focusing on a variety of local concerns not necessarily evaluated through economic analysis. Drawing from Warren Court precedent,⁹⁸ the NAAG Guidelines state: "Other goals of the [antitrust laws] were the prevention of excessive levels of industrial concentration because of the political and social effects of concentrated economic power . . . and the maintenance of opportunities for small and regional businesses to compete."⁹⁹ For example, state concerns include local ownership of business, consumer pricing and commitment to the community.¹⁰⁰ One commentator

inafter Horizontal Merger Guidelines].

95. Seymour D. Lewis, a former Special Assistant to the U.S. Attorney General in the Antitrust Division comments:

The NAAG Merger Guidelines differ from those of the Justice Department and the FTC in many important respects. The NAAG Merger Guidelines make no presumption that mergers are efficiency-enhancing and assert that efficiencies are not to be viewed as a defense. Above all, they emphasize that Congress, in amending Section 7 of the Clayton Act in 1950, determined that highly concentrated industries were characterized by the exercise of market power and that Congress intended to prohibit mergers even prior to the actual attainment or exercise of market power i.e., when there was a trend toward harmful concentration.

Lewis, *supra* note 36, at 37.

96. Horizontal Merger Guidelines, *supra* note 94, ¶ 13,405, at 21,185 (reviewing purposes of federal laws).

97. Horizontal Merger Guidelines, *supra* note 94, ¶ 13,405, at 21,181.

98. See *supra* note 28.

99. Horizontal Merger Guidelines, *supra* note 94, ¶ 13,405, at 21,185 (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 315-16 (1962)). See also Helene D. Jaffe, *Report From the National Association of Attorneys General — State Antitrust Enforcement Programs: Multi-State Compact Procedure and Pre-Merger Review*, 58 ANTITRUST L. J. 223, 225 (1989) (noting that when states evaluate a merger, considerations they employ often "fall outside the ambit of pure economic theory . . .").

100. See Jaffe, *supra* note 99, at 227 (illustrating the local nature of states' concerns by recounting one merger in which a state concern was the resulting firm's commitment to continue contributions to local charities); *NAAG Adopts Resolution*, *supra* note 91, at 892 (discussing concerns of state attorneys general set out in the NAAG Horizontal Merger Guidelines). One of California's primary concerns with respect to the merger of American Stores and Lucky Stores was the anticipated effect on consumer prices of joining two of the state's largest supermarket chains. *California v. American Stores, Co.*, 110 S. Ct. 1853, 1856 (1990).

notes that proposed mergers of particular types of businesses such as supermarkets, department stores, theater chains, gas stations and other retailers, run the greatest risk of close scrutiny by a state.¹⁰¹ States are especially attentive to mergers of these enterprises because they may pose a serious threat to the local economy through increased prices and decreased supply.

State antitrust policy also differs from federal policy with respect to its view of efficiency. While states recognize that efficiency gains may accompany mergers, the states accord this benefit less weight than the federal government. Again relying heavily upon Warren era precedent, the NAAG Guidelines state:

To the limited extent that Congress was concerned with productive efficiency . . . it prescribed the prevention of high levels of market concentration as a means to this end. Furthermore, the Supreme Court has clearly ruled that any conflict between the goal of preventing anticompetitive mergers and that of increasing efficiency must be resolved in favor of the former explicit and predominant concern of the Congress.¹⁰²

Critics of proposed state antitrust enforcement measures base their objections on what they perceive as the states' aggressive attitudes against mergers. For example, the NAAG's Voluntary Pre-Merger Disclosure Compact has been severely criticized. William F. Baxter, a former Antitrust Division chief, labeled the Compact

101. Jaffe, *supra* note 99, at 224-25.

102. Horizontal Merger Guidelines, *supra* note 94, ¶ 13,405, at 21,185. The NAAG Guidelines draws its language in part from *FTC v. Proctor & Gamble*, 386 U.S. 568, 580 (1967) where the Warren Court stated: "Possible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition."

One author describes the Warren Court's decisions as fuzzy "societal antitrust," characterized by enforcement based primarily upon value judgments and support for a policy of protectionism for small businesses. Arthur D. Austin, *The Emergence of Societal Antitrust*, 47 N.Y.U. L. REV. 903 (1972). Professor Austin describes the majority opinions of the Warren era as "a metamorphosis of economics, populism, and opaque value judgments." Austin, *supra* note 28, at 935. Austin also notes that under decisions such as *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), the Court created highly restrictive analytical tests for determining the permissibility of a merger. He argues that the Court's interpretation of the Cellar-Kefauver amendment to the Clayton Act in that case proscribed merger activity whenever "(1) there is a probability or a 'tendency' toward oligopoly; (2) other mergers will be 'triggered'; (3) mom and pop enterprises may be eliminated; or (4) the acquisition creates efficiencies." *Id.* at 936. (citing *Brown Shoe*, 370 U.S. at 311-23).

"more a political attack than a serious effort to write merger guidelines."¹⁰³ He described the Compact as defining markets in artificial terms not tied to economic reality, resulting in an interventionist, overly restrictive set of rules.¹⁰⁴ Baxter concluded that the NAAG's guidelines were a return to the Warren/Douglas era,¹⁰⁵ creating a presumption against the validity of all mergers.¹⁰⁶ Utah Attorney General David L. Wilkinson also criticized the Compact as creating "a kind of shadow government to the national government [the founders] devised."¹⁰⁷ These criticisms support the view that state antitrust policy actively seeks to preserve local markets and promote non-economic considerations through an over-aggressive antitrust enforcement process.

An over-aggressive state antitrust program tends to destabilize the federal enforcement process. A state enforcement process based on criteria different from that considered by the federal government results in a two-tiered enforcement structure. Merging firms may find structuring their transactions to reconcile the disparate values advocated by state and federal authorities a formidable task. Unless the federal enforcement process can account for state activity through appropriate modifications, beneficial mergers might fail based solely on local concerns. If the federal enforcement process is to be changed, should the modifications advance existing federal policy or incorporate the states' policies of protecting local markets and employment?

103. *NAAG Explores Use of Compact To Get Premerger Notification Data*, 52 Antitrust & Trade Reg. Rep. (BNA) No. 1320, at 1138 (June 18, 1987) [hereinafter *NAAG Explores Use of Compact*]. Reiterating Baxter's comments regarding the Compact, Utah Attorney General David L. Wilkinson expressed his dissent to the adoption of the Compact in a letter to the NAAG. *Id.*

104. *Id.*

105. See Austin, *supra* note 28, at 935-36 (reviewing the Warren/Douglas antitrust enforcement era in which a variety of quantitative methods were employed to actively oppose mergers in support of socio-economic goals rather than market objectives).

106. See *NAAG Explores Use of Compact*, *supra* note 103, at 1138. Baxter concluded:

[T]he pervasive theme of the [NAAG Guidelines] is that there should be a presumption against the validity of all substantial mergers and that all should be attacked unless they're clearly permissible within the standards of the old Supreme Court cases. The authors see no harm in attacking even those mergers which, in the end, prove to be lawful: in their view it's the court's job to repel overly zealous enforcement. This of course is insane, because, as a business matter, the great majority of proposed mergers cannot survive the delay imposed upon a transaction by an ill-founded antitrust attack.

Id.

107. *Id.*

PART III

A. State Involvement in the Enforcement Process

The Supreme Court's holding in *American Stores*¹⁰⁸ serves as a reminder that the populist foundations of the antitrust laws are not dead: purely economic considerations will not override vigorous antitrust enforcement and the right of any party to challenge the permissibility of a merger. Still, the preceding comparison of federal and state antitrust policies illustrates that equal weight cannot be given to both economic concerns and unfettered enforcement activities if predictable and correct results are desired.¹⁰⁹ If state enforcement of federal antitrust law is to continue, it behooves Congress to define the place of state concerns in the enforcement scheme. Are outcome and process sufficiently predictable for merging firms if states are permitted to use the federal antitrust laws to promote their own, parochial interests? Should federal enforcement policy incorporate the interests reflected by states' efforts into a more unified enforcement structure?

In response to these fundamental policy concerns, Congress could eliminate altogether the states' right to seek a divestiture. However, this alternative is unacceptable for three reasons. First, maintaining the states' right to seek a divestiture is consistent with the policy that mergers be scrutinized so that (1) important legal issues are identified, (2) the issues are vigorously debated, and (3) a correct result is reached regarding the merger's permissibility. Upholding the states' right to seek a divestiture checks political biases which might tend to make enforcement lax, ensuring a thorough examination of complex legal issues prior to merger approval.

Second, The political sentiments underlying the antitrust laws weigh against eliminating the states' right to seek divestiture. One author describes the antitrust laws as "a 'charter of liberty,' . . . and a 'bulwark against arbitrary action and oppression at the hands of the economically powerful' . . . suggest[ing] individual freedoms, freedom to control one's destiny, freedom in something other than the economic realm" ¹¹⁰ Unless Congress is will-

108. *California v. American Stores, Co.*, 110 S. Ct. 1853 (1990).

109. "Correct" results refer to an analysis of mergers which allows procompetitive mergers to proceed and prevents anticompetitive ones.

110. David W. Barnes, *Nonefficiency Goals in the Antitrust Law of Mergers*, 30 WM. &

ing to battle these deeply entrenched societal values, a less drastic remedy is required.

Finally, practical considerations favor preserving a state cause of action under the federal antitrust laws. As participants in the enforcement process, states contribute additional resources not otherwise available to the FTC or the DOJ. More importantly, states enforcing federal laws are less likely to enact their own, more restrictive antitrust statutes. States have already organized and created separate enforcement procedures because they are prohibited access to the pre-merger HRS information filed with the FTC and DOJ.¹¹¹ Eliminating a state cause of action for divestiture would exacerbate the problem of disparate antitrust standards. A better, more efficient alternative is to combine federal and state enforcement efforts, allowing states to be players in the review process with federal authorities and the merging firms.

B. The Proposal

Congress should amend section 7A(h) of the Clayton Act to:

(1) allow for the distribution of the Hart-Scott-Rodino information to the states, and

(2) limit the states' right to use the Hart-Scott-Rodino information to instances where it is used for pre-merger analysis under the Department Of Justice Merger Guidelines or for bringing a suit under section 7 of the Clayton Act.

This proposal for legislative reform of the anti-merger laws reflects the need for the states' presence in the enforcement process. It incorporates a divestiture remedy for the states, increases the predictability of the outcome and process of merger enforcement, and relieves the existing tension between broad legal standards in the existing antitrust statutes and their ability to render correct results. The proposal also continues to fulfill the objective of antitrust law to "promote consumer welfare through the efficient use and allocation of resources, the development of new and improved products, and the introduction of new production, distribution, and organizational techniques for putting economic resources

MARY L. REV. 787, 835 (1989) (footnote omitted).

111. See *supra* note 92 and accompanying text.

to beneficial use."¹¹²

1. Distribution of the HSR Information

State efforts to obtain the HSR filing information have been unsuccessful.¹¹³ Courts have denied the states access to this information by strictly construing the language of section 7A(h) of the Clayton Act: "documentary material filed with the Assistant Attorney General or the Federal Trade Commission . . . shall be exempt from disclosure . . . and no such information . . . may be made public . . ."¹¹⁴ In *Lieberman v. FTC*, the court "doubt[ed] if Congress would have intended to have the staffs of fifty state attorneys general sitting as oversight committees reacting to [FTC or DOJ] decisions whether to block large-scale mergers of national or international significance."¹¹⁵ Given the current climate of state merger enforcement, this comment by the *Lieberman* court is probably not far from the truth.

Following the *American Stores* decision, however, the argument in favor of disclosure is stronger. A post-merger divestiture implies that the initial decision permitting the merger was incorrect. State involvement in the federal enforcement process could help to complete, correct or contribute to the information found in the HSR filings to prevent errant decisions before firms consummate mergers. Distributing HSR information to the states facilitates their analyses of proposed mergers and contribution to the enforcement process.

Firms undertaking a merger should submit HSR information to the federal agency (FTC or DOJ) assigned to the area of commerce affected by the merger. Distribution of the information to the states should occur via a method similar to that set out in the NAAG's Voluntary Pre-Merger Disclosure Compact.¹¹⁶ The Compact designates that a "liaison state," one of several members of the Compact, receive the information¹¹⁷ and establishes an order of preference within this group of member states to determine which will act as liaison. The HSR information is to be distributed first to

112. Donald F. Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, 75 CAL. L. REV. 797, 798 (1987).

113. See *supra* note 92.

114. Clayton Act § 7A, 15 U.S.C. § 18a(h).

115. 771 F.2d 32, 40 (2d Cir. 1985).

116. See Compact, *supra* note 92, ¶ 13,410, at 21,201-02.

117. *Id.* ¶ 13,410, at 21,202.

"the Attorney General of the state which is the principal place of business of the acquiring party, . . . next to the Attorney General of the state which is the principal place of business of the acquired party, next to the Attorney General of the state of incorporation of the acquiring party and next to the Attorney General of the state of incorporation of the acquired party."¹¹⁸ Adopting a similar structure for distributing the HSR information to the states is logical because these parties will have the most significant interest in the outcome of the merger.

2. Restricting the States' Use of the HSR Information

The success of this proposal as a viable alternative to the existing enforcement structure depends upon limiting the states' use of the HSR information. The objective of this proposal is to transform the concurrent federal/state enforcement of the federal anti-merger laws into a single enforcement process. Consistent with that goal, the proposal would prevent the collateral use of HSR information by the states to proscribe a merger through means other than the federal antitrust laws. Without this restriction, the states' power over the merging firms would be too great.

First, with free access to firms' confidential information, states could challenge mergers under their own state antitrust laws. States dissatisfied with federal enforcement efforts have tried to grasp this power by proposing their own Model Legislation for Antitrust Reform.¹¹⁹ Title VIII of the Model Legislation proposes to amend section 7A(h) of the Clayton Act to provide: "Nothing in this section is intended to prevent disclosure [of the HSR information] to state Attorneys General for the purpose of investigating or enforcing a claim under the federal *or state* antitrust laws"¹²⁰ Restricting states' use of HSR information cannot prevent states from enforcing their own antitrust laws altogether. However, states would not be able to use information obtained through the proposed distribution procedure in their state law cases. States may use the HSR information only to negotiate in the pre-merger stages or to bring a suit under section 7 of the Clayton Act.¹²¹ Further-

118. *Id.* (footnote omitted).

119. See NAAG's *Proposed Model Legislation For Antitrust Reform*, 51 Antitrust & Trade Reg. Rep. (BNA) No. 1294, at 914 (Dec. 11, 1986) (setting forth the states' proposal for modification of federal antitrust laws in order to meet their enforcement needs).

120. *Id.* at 916 (emphasis altered).

121. Clayton Act § 7, 15 U.S.C. § 18.

more, states would be required to announce that they intend to sue prior to the merger's completion or be estopped from bringing a section 7 suit for divestiture in the future.¹²² Therefore, to file a section 7 suit, a state would be required to actively participate in the pre-merger evaluation and negotiation of each merger.

Second, restricting states' use of HSR information would prevent them from delaying action. For example, suppose a merging firm files HSR information with the DOJ and state authorities. The DOJ conducts its analysis and approves the merger. The state opposes the merger, but rather than inform the firm of its objections, the state waits for the DOJ's evaluation and the completion of the merger. Thereafter, the state uses the HSR information to file a section 7 suit seeking divestiture. The enforcement regulations proposed here create reasonable restrictions on the use of the HSR information so that the states cannot follow this hypothetical scenario and unfairly surprise the merging firms with an unexpected suit under federal antitrust law.

Finally, in extending the divestiture remedy to states and private parties, the *American Stores* decision opens the door for inconsistent verdicts.¹²³ This proposal closes that door through its use of the "liaison state."¹²⁴ States must channel their concerns through the liaison state, and the liaison, as the representative of all other interested states, would be the only state entitled to bring a section 7 suit. Thus, this proposal strikes a balance which allows the states to assuage their concerns about mergers while protecting firms from untimely divestiture orders.

C. Predictability Regained

1. PREDICTABILITY OF THE OUTCOME: A SINGLE STANDARD

Critics of state antitrust enforcement argue that those efforts will lead to a proliferation of erroneous and inconsistent standards among the courts.¹²⁵ This problem arises when states attempt to

122. The goal of this provision is to prevent a state from raising a divestiture suit immediately following the completion of a merger. The provision ensures that at the time of the merger, the liaison state was on notice of the details of the merger, that it participated in analyzing the transaction and that it raised any existing concerns. Circumstances may justify a § 7 suit for divestiture at a later date. See *supra* text accompanying notes 31-36. However, any subsequent suit would have to be assessed taking account of the state's knowledge of the transaction at the time it took place.

123. See Newman, *supra* note 69, at 6 (discussing the potential adverse effects of the *American Stores* decision).

124. See *supra* text accompanying notes 117-18.

125. See Lewis, *supra* note 36, at 38 (noting Washington, D.C. lawyer Robert Bell's as-

prohibit mergers based on standards other than those employed in federal enforcement efforts. For example, "[t]he NAAG Guidelines follow the Supreme Court precedents which make it easier for the plaintiff — federal, state, or private — to win."¹²⁶ Unfortunately, these precedents reflect the policies of an era when mergers were considered inherently bad and the Supreme Court constructed criteria to defeat them.¹²⁷ By asserting federal claims based on old antitrust doctrine, states could lead courts to resurrect standards that would conflict with those embodied in current antitrust enforcement policy. Effective modifications to the merger enforcement process must incorporate a single policy whose "primary function . . . is to protect and promote . . . procompetitive conduct, not to protect individual competitors as such."¹²⁸ Adopting a single analytical standard for merger enforcement guards against revival of outdated criteria.

Additionally, inconsistent standards impede a firm's ability to predict whether the federal or state authorities will challenge their proposed merger. Because federal and state policies differ, constructing a merger to meet the standards of one authority will often cause a conflict with the other. The wisdom of enforcing federal antitrust laws that adhere to two conflicting standards must be questioned. Modifying the enforcement process to allow federal and state agencies to consistently evaluate each merger under one set of standards offers merging firms more certainty in planning their transactions.

Admittedly, the rules proposed here cannot force states to adopt an antitrust policy they believe counter to their interests. Thus, with respect to state antitrust laws, states may continue to analyze mergers as they do now. However, these modifications would at least ensure that a state intending to pursue a section 7 suit would frame its arguments against a merger to conform with federal policies implicated by the transactions, not local policies.

This section proposes that the Justice Department's 1984 Merg-

sertion that no state has the expertise that the FTC has in analyzing large mergers, which Bell made in response to the position of Lloyd Constantine, chief of the Antitrust Law Section of the ABA and supporter of state enforcement of national merger laws).

126. *Id.* at 37.

127. See Austin, *supra* note 28, at 932-45 (tracing the history of merger enforcement and noting periods when mergers were considered inherently anticompetitive). See also *supra* text accompanying notes 90-98.

128. Turner, *supra* note 112, at 798.

er Guidelines¹²⁹ provide the analytical framework for the modified enforcement program. The Merger Guidelines reflect federal policymakers' belief that efficiency is beneficial.¹³⁰ Examining several of the economic trends affecting U.S. firms today illustrates the necessity of continuing this policy. First, as markets continue to globalize, pressure on U.S. firms to compete internationally increases. Federal antitrust policy must allow for the myriad of industries and markets to which it will be applied. Accounting for this diversity of commercial enterprises requires that many of the goals of state antitrust policy be subordinated to national considerations. State enforcement efforts focusing on more parochial interests may hinder or prevent those mergers that, viewed from a national perspective, would create efficient and ultimately more competitive firms.¹³¹

Second, according to one author, "antitrust doctrine is succumbing to new business relationships."¹³² The on-going evolution of large-scale industry often extends firms' operations into a number of markets, both regionally and nationally. Large-scale enterprises have been described as vertically disaggregated, due to their reliance on many other firms for a variety of business functions; the corporation is being redefined as a network of subsidiaries.¹³³ Firms adopt this structure because it is more efficient and increases their ability to compete in the marketplace.

Antitrust law is out of step not only with emerging business organizations, but with the laws of other nations as well. United States antitrust law has been described as "an American provincialism."¹³⁴ Arguably, U.S. antitrust laws place domestic firms at a disadvantage with their foreign competitors. Subjecting American firms to restrictions other governments do not impose on their foreign counterparts may cost American companies a competitive edge.¹³⁵ A modified federal antitrust enforcement process should account for this problem by removing state-imposed restrictions which inhibit effective competition by domestic firms in the

129. Merger Guidelines, *supra* note 27. See also *supra* text accompanying notes 73-91.

130. See *supra* text accompanying notes 88-90.

131. Lewis, *supra* note 36, at 39.

132. Austin, *supra* note 28, at 961. Austin also predicts that the inability of antitrust law to account for emerging business structures will be the law's demise. *Id.*

133. *Id.* (citing Special Report, *And Now, the Post-Industrial Corporation*, BUS. WK., Mar. 3, 1986, at 64).

134. *Id.* at 960.

135. LESTER C. THUROW, *THE ZERO-SUM SOCIETY* 146 (1980).

global market.¹³⁶ Assuming increased efficiency will enable firms to become more competitive, a federal law should favor standards that allow firms to operate more efficiently.

2. Benefits of Predictability Of The Process Recovered

The modifications proposed in this note will make the enforcement process more timely in three ways. First, this proposal brings together the three parties most interested in a merger: merging firms, federal authorities and state authorities. Logistically, one enforcement process is more likely to render timely results than two. This is especially true where the parties involved will use the same analytical standards to evaluate mergers as proposed here.

Second, this proposal accelerates the enforcement process by focusing authorities' attention on the merger during its early stages. Because all of the parties will have the HSR information at the outset, state and federal authorities can discover potential problems and raise their concerns at earlier stages. States will not have to engage in the time consuming process of serving investigative subpoenas on the merging parties in order to assess the details of the transaction.¹³⁷ Firms can enter the enforcement process expecting to receive a response from reviewing authorities more quickly.

Finally, as the old saying goes, time is money. In deciding

136. States tend to define markets more narrowly than the federal Merger Guidelines. See *supra* text accompanying notes 84 (Merger Guidelines' definitions) and 96-102 (state guidelines). When markets are more narrowly defined, proposed mergers are more likely to result in impermissibly high levels of market share.

For example, in 1988, the Canadian corporation Campeau attempted to acquire Federated Department Stores for \$6.5 billion. Lewis, *supra* note 36, at 37. Campeau had previously acquired Allied Stores, which, in turn, owned Jordan Marsh Stores. *Id.* Jordan Marsh competed directly with the Federated-owned Filene Stores. *Id.* Federated argued that if Campeau were permitted to acquire Federated, Campeau would control 50 percent of the market of moderate- to better-priced stores. *Id.* According to the FTC, however, the relevant market was broader than that described by Federated, encompassing both specialty stores and mass merchandisers. *Id.* Under the FTC's market definition, the acquisition of Federated would not give Campeau an impermissible market share. *Id.* Subsequently, the states of Massachusetts, Maine and New Hampshire challenged the merger based on Federated's arguments and obtained a consent decree forcing Campeau to divest itself of all Filene stores. *Id.* at 37-38.

137. Currently, states must serve investigative subpoenas, civil investigative demands or other precomplaint demands on the merging firms to obtain the HSR information. See Compact, *supra* note 80, 92, ¶ 13,410, at 21,201. In the NAAG's Voluntary Pre-Merger Disclosure Compact, the states agree to forgo these demands if the merging firms provide the HSR information to them. *Id.*

whether or not to merge, firms must consider the cost of the transaction itself. The longer firms have to spend executing mergers, the more those transactions will cost. Eventually, the merging firms will have the option of complying with requests aimed at alleviating the concerns of enforcement authorities and negotiating a settlement with them or walking away from the merger. The sooner this option is presented, the less firms will spend on the merger in the intervening period when they can only guess what steps they should be taking to satisfy enforcement authorities. Furthermore, if firms can count on early guidance from reviewing authorities, they may be more willing to undertake questionable mergers which could yield more efficient business organizations. The potential for multiple reviews and conflicting opinions of mergers under the existing enforcement scheme weighs against pursuing mergers the government may be more likely to find objectionable. In addition, government authorities will spend less on any particular enforcement proceeding if they coordinate their activities and reduce the time that would otherwise be devoted by each. For these reasons, a more timely process is in the best interests of all parties involved.

Involving states with the federal authorities in a single, coordinated enforcement process relieves firms from having to guess whether or not to approach the state with their merger plans.¹³⁸ This proposal makes the enforcement process more predictable for merging firms by clarifying (1) when the states are to be involved in the federal enforcement process, (2) what procedures the states must follow, and (3) what rights and obligations the states possess.

Incorporating state enforcement efforts into a single process eliminates the uncertainty of when the states will exercise their power to enforce antitrust statutes. Presently, states have the benefit of waiting until the FTC or DOJ announces whether or not it intends to challenge a merger before acting under their own authority to enforce the federal law. Obviously, if the federal authorities

138. Firms must now engage in a cost-benefit analysis to assess whether information should be given to states in the pre-merger process. State review may create impediments for the merging firms that outweigh the chance for state approval of the deal. Under the current process, approaching a state with a merger proposal could raise several problems. First, an independent state investigation of the merger may delay the transaction. Second, a state may apply a different standard to test the plan and require undesirable modifications in the merger. *See supra* text accompanying notes 119-21. Finally, the state may object to the transaction altogether, opening the door to a suit challenging the merger. In light of these potential hazards, firms may conclude that the less the states know about their plans, the better.

decide to challenge a merger, a state would probably choose not to expend its own resources to duplicate the federal effort. Conversely, if the FTC or DOJ approves the merger, a state may then choose to investigate and challenge a questionable transaction on its own. After *American Stores*, a state can even wait to bring a divestiture until after firms have completed a merger.¹³⁹ Therefore, firms have a significant interest in learning what objections a state may have to a proposed merger. Under this proposal, firms are alerted to state objections early in the review process because states are involved from the start.

This proposal also clearly designates the procedures the states must follow as part of the enforcement team.¹⁴⁰ For example, states are required to evaluate each merger and must announce their intentions to challenge a merger before it is complete or be estopped from filing a post-merger suit.¹⁴¹ Specific enforcement procedures make the process more predictable.

Finally, by defining the rights and obligations of the states and firms involved, all parties will know what information must be exchanged, what effect review can have on the outcome of the transaction and when firms have cleared enforcement hurdles that could block completion of the transaction. To summarize, under this proposal, states have the right to receive and evaluate the HSR information and to voice their concerns and objections. They have the obligation to announce to the firms whether they intend to challenge the merger or be estopped from filing a post-merger section 7 suit. Firms have the obligation to submit the HSR information to the appropriate state authorities. If each party complies with these rules, firms can complete their mergers reasonably certain that the transactions are permissible under the antitrust laws.

Finality is perhaps the most important, yet elusive, objective of pre-merger review by enforcement authorities. Finality exists when firms can rely on the government's decision not to challenge a merger.¹⁴² When the enforcement process consistently renders pro-competitive results, federal and state authorities will be less likely to institute post-merger proceedings. In turn, the finality of

139. *California v. American Stores, Co.*, 110 S.Ct. 1853, 1867 (1990).

140. See *supra* text accompanying notes 112-24.

141. See *supra* note 123 and accompanying text.

142. Because markets are continually evolving, antitrust law may prove unreceptive to an absolute bar on post-merger government challenges. However, the pre-merger enforcement process makes those suits less likely to occur and, thus, acts as an incentive for firms to comply with the rules for review. See *supra* text accompanying notes 30-35.

federal and state merger decisions will be increased.

The proposed modifications help to ensure finality by prohibiting those mergers that tend to eliminate competition without yielding economic benefits.¹⁴³ At the same time, the comprehensive dialogue among merging firms and reviewing authorities offers a renewed incentive for firms to comply with the federal antitrust statutes and encourages procompetitive mergers to proceed. Three scenarios illustrate how this proposal increases the likelihood that the opinions of reviewing authorities that a merger is permissible will be reliable.

In the first scenario, both federal and state authorities agree not to challenge a merger. Because of the state's involvement in the process, firms may proceed with the merger confident that the decision is a reliable indicator the transaction will not be challenged. Even if states are compelled to use the federal Merger Guidelines,¹⁴⁴ state authorities will undoubtedly pursue every avenue offered by them to scrutinize each merger for adverse consequences to their local economies.¹⁴⁵ However, if, after an initial evaluation, the state approves the merger, then firms can reasonably rely on their decision being final.

In the second scenario, federal authorities approve the merger, but state authorities challenge it. Even in this situation, the process offers greater prospects for finality because firms will be encouraged to negotiate the terms of the merger with the states. At this point in the pre-merger period, firms will know the concerns of the state and can choose to comply with state demands for modification or abandon the merger. Negotiations with the state can be targeted to eliminate those aspects of the merger to which the state has objected and should protect firms from a future suit.¹⁴⁶

In the third scenario, both federal and state authorities decide to challenge a proposed merger. As in the second scenario, merging firms will have a clear indication of the governments' objections and will not have to speculate about whether or not a chal-

143. See Turner, *supra* note 112, at 798 (noting that even "populist" goals of antitrust enforcement are served by economics-based analysis when the analysis prevents merger activity that yields no economic benefit to society).

144. See *supra* note 27.

145. It is unlikely that this proposal will prompt states to disregard their local economic interests for the sake of economic benefits evident from a broader perspective of a transaction. States are likely to examine most critically those mergers they suspect will adversely affect local interests.

146. But see *supra* text accompanying notes 30-35.

lenge will ensue if merger plans proceed without modification.

Both the current enforcement process and the proposed enforcement process may require firms to modify their original merger proposal in order to satisfy both the federal and state governments involved. However, using a single analytical standard ensures that the firms will not be faced with conditions raised by federal and state agencies that are mutually exclusive. The proposed modifications offer firms a better opportunity to make informed judgments about proceeding with merger plans. The choice is simple: firms either negotiate an acceptable settlement with federal *and* state authorities or face the possibility of a section 7 suit by enforcement authorities.

Furthermore, the proposed process should increase the number of correct results because state involvement enables a more thorough analysis of the HRS information and encourages more vigorous enforcement under the Merger Guidelines.¹⁴⁷ Critics argue that the states lack the expertise needed to analyze large mergers.¹⁴⁸ States complain that the DOJ and FTC do not engage in the rigorous enforcement necessary to protect their economies from anticompetitive mergers. By working together, state and federal authorities will be forced to balance state interests and federal enforcement practices. The tension between their respective interests will serve as an internal check on the enforcement process. The FTC and DOJ can ensure that state merger analysis is sound, while states will have the right to enforce the anti-merger laws against those mergers they believe have been inappropriately approved by the federal authorities. The result should be fewer incorrect merger evaluations and more reliable rulings for merging parties.

CONCLUSION

Federal and state merger enforcement policies are on a collision course. The federal authorities support mergers that increase efficiency, whereas the states continue to guard the populist goals of early antitrust law. Absent political or ideological harmony, the disparate policies will continue to compete with each other to control economic development. The federal statutes do not provide

147. Justice Stevens noted in *California v. American Stores Co.*, 110 S. Ct. 1853, 1860 (1990), that "[t]he [Clayton] Act's . . . provisions manifest a clear [legislative] intent to encourage vigorous . . . litigation against anticompetitive mergers."

148. See Lewis, *supra* note 36, at 39 (noting opposition to state antitrust enforcement efforts).

the guidance of a single legal standard, making state and federal enforcement efforts antagonistic rather than complementary.

The *American Stores* decision left many unanswered questions for Congress and the courts regarding the role of the states in the federal merger enforcement process. Paramount among them is whether the existing antitrust laws are capable of delivering an efficient, predictable enforcement mechanism. The plain language of section 16 of the Clayton Act compelled the *American Stores* decision allowing states and private plaintiffs the power to seek divestiture of a merger. However, the time has arrived to rethink the language of the Act.

The proposed legislative changes advocating the distribution of the HSR information to the states, with an accompanying limitation on the use of that information, establish a consolidated federal/state merger enforcement program. Combining the efforts of federal and state authorities does not result in an impenetrable wall of enforcement, discouraging those who would otherwise consider a merger. To the contrary, this proposal facilitates merger enforcement and planning by adopting the Department of Justice Merger Guidelines as the single analytical standard for evaluating mergers and by improving the timeliness, clarity and finality of the enforcement process.

The proposal also reduces the existing tension between the broad language of the current anti-merger statutes and their ability to render accurate results. Through a flexible, fact-oriented, analytical process, the modifications encourage identification and resolution of problems in the early stages of a merger. Final decisions by the authorities are more accurate and reliable. Furthermore, a joint federal and state effort has a better chance of rendering correct results in a body of law that often requires crystal ball predictions.

Congress should adopt policies and mechanisms that facilitate procompetitive and efficient transactions if American industry is to compete in an increasingly integrated world economy. Mergers and acquisitions provide an effective means for firms to grow and streamline their operations. The proposed legislative modifications offer a means to merge federal and state enforcement efforts into an efficient, predictable process that encourages and ensures procompetitive transactions. Unchanged, current merger enforcement is destined to lead firms further into a quagmire of uncertainty and stagnation.

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